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CHANCERY COURT OF RICHMOND, VA.

MARIA E. MATHEWS v. JOSEPH E. GLENN *et als*.

1. **STATUTES — Construction — Retroactive effect.** The act of March 7, 1900 (Acts 1899-1900, page 1234), creating a limitation of two years on suits to avoid tax deeds, has no application to deeds made prior to its enactment, since there is nothing on the face of the act to indicate that it is to be given a retroactive effect.
2. **RES JUDICATA — Dismissal without prejudice.** A dismissal of a suit "without prejudice" is no decision of a controversy on its merits and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought.
3. **CHANCERY PLEADING — Suit to remove cloud — Possession.** The possession necessary to maintain a suit to remove a cloud on the title to real estate, which is under a lease, is not lost by an agreement of the party in possession with the defendant made prior to the suit, that a third person shall collect the rents from the property pending the litigation and hold them for the party prevailing in the suit.
4. **DELINQUENT LANDS — Notice to owner — Duty of applicant to purchase.** — The applicant to purchase delinquent lands under section 666 of the Code of 1887, as amended by the act of February 11, 1898, must use such a degree of diligence as diligent persons of ordinary intelligence would ordinarily exercise under like circumstances, when prompted by a sincere and earnest desire to ascertain in what county or corporation the land-owner resides. There must be an active, faithful, and reasonably intelligent search for the information necessary to make personal service on the land-owner.

Statement of the Case.

This was a suit brought to remove, as a cloud on the complainant's title, a tax deed obtained by the defendant under section 666 of the Code, as amended by the act of February 11, 1898, and prior amendments. It was the sequel to a similar suit between the same parties and in the same court, which was decided adversely to the complainant by the lower court, and that decree was affirmed on appeal on the sole ground that the bill did not allege a redemption, or offer to redeem, the property from the original tax sale to the Commonwealth in the interest of the complainant, and hence, the title not being in her, she had no standing in court to maintain a suit to remove a cloud on that title; the affirmance, however, being "without prejudice." That decision will be found reported in 100 Va. 352. The complainant then offered to redeem the property

in the manner indicated by tendering to the Clerk of the Hustings Court of Richmond the sum that would have been necessary for this purpose had there been no purchase by the defendant, which was refused, on the ground that the books showed nothing to be due, the taxes having been paid by Glenn. She thereupon filed her bill in the present case setting out, in addition to the allegations of the first bill, this offer to redeem, the proceedings in the former suit, and asking to have the deed set aside on the grounds originally alleged.

The property affected was located in an important business section of the City of Richmond. Through a combination of circumstances, and without fault of the complainant, it became delinquent for the non-payment of taxes and was bought in by the Commonwealth at the treasurer's sale in accordance with the statute. There being no redemption, in May, 1899, the defendant filed his application to purchase the property under section 666 as amended. A copy of the application was delivered to a deputy sergeant of the City of Richmond for service, who returned it "not found" and thereupon made affidavit in the terms of the statute that diligence had been used on behalf of the applicant to ascertain in what county or corporation the complainant resided without effect. An order of publication of notice was then entered, upon the completion of which and the expiration of the statutory period of four months, the Hustings Court of Richmond entered an order reciting the due publication of notice, dispensing with a survey of the property, and directing the clerk to make a deed to the defendant, which was done.

It appeared in evidence that the complainant had been for many years a resident of Richmond; that she had owned the property since 1887 and had made it her home during much of that time; that prior to the filing of the application she had rented it out and at the date of such filing was residing a few blocks distant; that her husband's name was shown in the deed conveying the property to her, which was of record, and that his name and address were also in the city directory and his whereabouts thus easily ascertainable; and that she had no actual knowledge of the delinquency of the property or of the application to purchase it until her attention was called to a notice in a newspaper reciting the conveyance to the defendant. It further appeared that the deputy sergeant, to whom the application was delivered, examined the city directory and, not finding the complainant's name, gave the application to another

deputy for service. The latter returned it without having served it, and the first deputy then made the affidavit of diligence. Other facts as to what efforts were used to make service sufficient appear in the opinion of the court.

Several grounds were urged in avoidance of the deed, but that chiefly relied on, and the only one noticed by the court in its opinion, was the failure to use diligence to discover the complainant in order to give her personal notice of the application. The defendant, however, contended, that, even if proper diligence had not been exercised, which was denied, no evidence was admissible to show this, since the return of the officer of "not found," the affidavit of diligence, the order of publication, and the order of the Hustings Court, directing the deed, constituted a record which could not be controverted, and that this, on its face, showed the statute to have been regularly complied with. In thus invoking the principle of the verity of the record, it was sought to avoid the effect of the decision in *Va. B. & L. Co. v. Glenn*, 99 Va. 460, where no notice of any character was given, or attempted to be given, to the party attacking the deed, and the record, so called, in that case, was, therefore, defective on its face. It was insisted also on behalf of the defendant that the negligent omission of the officer to make personal service under an application of this character cannot be visited upon the applicant, where there is a regular return on the application, but that the property owner must in such case seek his remedy against the officer.

The defendant also relied upon the statute of limitations and *res judicata*, which, with other points, are fully treated in the court's opinion.

A. W. Patterson and Henry C. Riely, for the complainant.

W. H. Werth, for the defendant.

GRINNAN, *Judge*:

I shall pass upon the various questions arising in this case, which I may deem it necessary to notice, as briefly as possible, taking them up in the most convenient order.

Statute of Limitations of March 7, 1900.

I do not think that this defence set up by Glenn can be main-

tained, whether raised by plea or answer. The deed assailed in this suit was made and recorded about three months prior to the passage of this act, which can be given only a prospective effect. "Courts will not construe a statute so as to give it a retroactive effect unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature." *Crabtree v. Building Association*, 95 Va. 677. The authorities are unanimous in this view. Not only does nothing appear on the face of the act (Acts 1899-1900, p. 1234), to indicate that it was intended to work backwards, but the entire effect to be given to it appears to be prospective only. The act, after defining the effect to be given to deeds made under it, then requires a suit to cancel "such deed" to be brought within two years. What deed? Clearly a deed executed after the date when the statute became operative. Nor can I agree that section 2938 of the Code of Virginia (1887), bears upon the question before us, for that act applies in express terms to actions, suits, &c., "which may be pending on the day before this Code takes effect or the right to prosecute which, under the laws in force on that day, shall have accrued before that day."

Res Judicata.

Counsel for Glenn has most earnestly insisted that this defence is a complete bar to the prosecution of this suit, but I am unable to concur in his view. However much he may combat the line of reasoning by which the Court of Appeals reached its conclusion in the former suit, there is no doubt in my mind as to what the final result was. The court was of opinion that Mrs. Mathews had failed to do a certain specified act that was necessary to qualify her to bring that suit and to give this court jurisdiction of her complaint and decided "that the bill ought to have been dismissed, but without prejudice." See decree of Court of Appeals entered on June 12, 1902. There can be no question that a "dismissal of a suit without prejudice" is no decision of a controversy on its merits and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought at all.

In Glenn's answer to the original bill in the present cause he states by way of argument, "that the payment of the taxes by the applicant will enure to the benefit of the delinquent and pass to the delinquent the State's title in every case where such payment does not operate as a valid purchase by the applicant from the State, and

thus pass the State's title to the applicant; or in other words such payment by the applicant will in every case operate as a redemption for the benefit of the delinquent where the attempted purchase and deed to the applicant is void. It is self-evident that the payment must operate in one way or the other, and that it must take the title out of the State and vest it in the delinquent or the purchaser, and that such payment makes either a valid redemption or a valid purchase." The cases of *Parsons v. Newman*, 99 Va. 298, *Va. Bldg. & Loan Co. v. Glenn*, 99 Va. 460, and *Glenn v. Brown*, 99 Va. 322, are cited by him as authorities for this proposition. This same view—that the payment to the State of the entire amount due her, such as was done in the case at bar, must enure in one or the other of these directions—was pressed upon the Court of Appeals by counsel for Mrs. Mathews on page No. 3, in her petition to the Court of Appeals in the former suit for a rehearing. In its opinion in the former suit (*Mathews v. Glenn*), delivered on March 13, 1902, by the Court of Appeals, it is stated: "The bill makes no attack upon the regularity or validity of the proceedings by which the State acquired title to the property. The State, if the deed to the appellant passed nothing, is still, so far as the record in this case shows, the owner of the property in fee. After the property became vested in the State, the only right which the appellant had was the right of redemption, and until the property was redeemed by her or by some one in her interest or which enured to her benefit, she could not maintain a suit to remove a cloud upon the title. Her offer to refund to the appellee the amount which he had paid as the consideration for the clerk's conveyance to him cannot be regarded as an offer to redeem the land. Neither can the appellee's payment to the clerk enure to the benefit of the appellant, for that was not the payment of taxes due upon the property, but the payment of the purchase price at which the State sold the property. Neither did the clerk's act in receiving that sum and making the conveyance, if void as alleged in the bill, deprive the appellant of the right of redemption." Whatever may have been the previous views of the Court of Appeals, as ascribed to it by counsel for Glenn and Mrs. Mathews—that the payment to the State of the full amount, for which she will permit redemption, must enure to the benefit of either the tax-applicant or the land-owner—it seems that the latter branch of this argument did not meet with favor in the opinion of the court in *Mathews v. Glenn*; for I take the meaning of that decision to be

that *redemption* can be only effected by some person holding such title or interest in the property as will entitle them to redeem; that the payment by Glenn, a stranger to Mrs. Mathews and her title, will not enure to her benefit as a redemption; that although the State has received full payment from Glenn, nevertheless such payment does not constitute a lawful redemption by Mrs. Mathews, and that she can only effect a redemption by the personal act of herself or of some one acting for her in redeeming or offering to redeem; and that, until Mrs. Mathews had done one or the other of these last named acts, there has been no redemption and the title to the property has not been taken out of the State, and Mrs. Mathews has not clothed herself with that full legal title or right which will alone qualify her to maintain a suit of this kind. I have digressed here somewhat, possibly, in giving my views as to the effect of the opinion in *Mathews v. Glenn* (which I have done with some diffidence), because the meaning of the court's decision has been debated at length, with much earnestness and ability on both sides, and because of the great insistence of Glenn's counsel that a proper interpretation plainly shows that the defence of *res judicata* ought to be sustained.

Has the Court Proper Jurisdiction?

It is claimed by Glenn that it is not shown that the plaintiff has such possession of the property as will give a court of equity jurisdiction of a bill to quiet the title. It is also contended by Glenn that the plaintiff should not have been allowed to file her amended bill in this cause, wherein she specifically alleges by way of amendment that the possession is in herself; but I think that the case of *Glenn v. Brown*, 99 Va. 322, is sufficient authority for the propriety of allowing the plaintiff to do so. It is insisted by Glenn that the agreement of April 20, 1900, between Glenn and Mrs. Mathews (see page 90 of Exhibit A with Bill, Record of Former Suit), whereby it was stipulated that the rents of the property pending the first litigation were to be collected by the real estate agents, Brown & Co., as the agents of the parties and were to be held by this firm for the benefit of the prevailing party in that suit, shows that Mrs. Mathews did not have the possession of the property; but when I turn to the record of the former suit and read it in connection with the paper marked "Agreement of Counsel," I think that Mrs. Mathews must be considered as in sufficient legal possession of the

property for the purpose of maintaining this suit; *e. g.*, for the purpose of repairs, of selecting tenants, of fixing the length and terms of leases and for all other such purposes, save that of collecting the rents—even granting that the agreement of April 20, 1900, has not been terminated by an unforeseen event, the failure of either party to prevail in the former suit, with reference to which it was made.

Supposing for the moment that Mrs. Mathews did not have such possession of the property as will give a court of equity proper jurisdiction of her complaint, it will be necessary, however, for the court to pass upon the title to the fund of \$541.98, deposited in bank to the credit of the court under decree of January 12, 1903, and incidentally, in consequence, to pass upon the merits of this controversy. Whilst Glenn has objected to the jurisdiction of the court, yet, at his instance, so much of the decrees of Dec. 19, 1902, and of January 12, 1903, as directed the payment of this money into court, were entered. As a practical matter the court is bound to make a proper disposal of the fund under its control, under such circumstances. See *Henley v. Perkins*, 6 Gratt. 615, and *Eacho v. Cosby*, 26 Gratt. 112. It will be noted too that Brown & Co. have filed a cross-bill in the suit by way of interpleader, which it appears to me they have a right to do. I will say, too, that Mrs. Mathews, having now offered to redeem the property, is now in a position to maintain her bill for relief in this suit.

The Merits of the Controversy.

Counsel for Mrs. Mathews challenge the sufficiency of the affidavit of "diligence," upon which is based the order of publication against Mrs. Mathews, a copy of which is filed with the paper marked "Agreement of Counsel." If this affidavit is fatally defective, then, inasmuch as it is a necessary link in the chain of proceedings leading up to the clerk's deed to Glenn, the deed itself must fall. *Va. B. & L. Co. v. Glenn*, 99 Va. 460. It will be noticed that this is a bald affidavit of "diligence" and that it does not show any fact or circumstance on its face by which the court (or clerk), can determine whether actual "diligence" has been used—such diligence as measures up to the legal standard of due diligence. As authorities, amongst others, for the sufficiency of this affidavit, I am referred by counsel for Mrs. Mathews to the case of *Romig v. Gillett* (U. S. Sup. Ct. Nov. 17, 1902), and to 17 Encycl. of Plead. & Pr. pp. 29, 63. See also 8 Va. Law Register, p. 691. There is

undoubtedly high authority, based on sound reason, for the proposition that an affidavit of "diligence" or of "due diligence" should set forth with sufficient detail the circumstances constituting the "diligence" or "due diligence," so that it may be determined by the face of the affidavit whether the diligence has been due and sufficient in the legal sense, and that the affidavit without such circumstantial detail is a mere conclusion of law and is not valid. Since our Court of Appeals has never passed upon the sufficiency of an affidavit of this kind, and in the view that I will take of this case it will be unnecessary for me to decide upon this question, I express no opinion upon it.

Having touched upon some of the preliminary points in issue, I now come to the substantial matter of the controversy. Assuming that the affidavit of "diligence" is in legal form, the question arises, was diligence actually used on behalf of Glenn to ascertain in what county or corporation Mrs. Mathews resided? I take it that a proper construction of the statute, which authorizes the order of publication against the land-owner and which requires the affidavit mentioned as the basis of this publication, contemplates necessarily that actual diligence measuring up to the legal standard must have been used and that a failure to attain to this standard of diligence will invalidate the applicant's proceedings, inclusive of the clerk's deed. It could never have been intended that a tax applicant can claim the benefit of the affidavit, where the facts behind it will fail to justify it, and can vouch as a sufficient authority for his action the bare letter of the law, the spirit and intent of which had been violated. It would be impracticable to lay down a fixed rule, as to what amount of diligence must be used, that would be applicable to all cases; each case must be tested by the peculiar circumstances of that case. It cannot be intended that the greatest diligence that ingenuity can suggest must be used, for the statute uses the simple word "diligence." I think that the tax applicant should use such a degree of diligence as diligent persons of ordinary intelligence would ordinarily exercise under like circumstances when prompted by a sincere and earnest desire to ascertain in what county or corporation the land-owner resides. There must be an active, faithful, and reasonably intelligent search for the information. The evidence in the record shows plainly to my mind that the facts upon which Glenn's affidavit are based fall below this standard. It appears to me that no reasonable degree of diligence was used to obtain the

proper information, for it is apparent that Mrs. Mathew's place of residence in this city could have been readily found by the most ordinary methods of inquiry. She had lived for several years on the property involved in this suit and had then moved only a short distance away to her present place of residence; her tenant had occupied the property for several years, after she had vacated it, and up to a short time prior to Glenn's filing his application; and yet no inquiry was made of any person in that vicinity. The property in suit was untenanted during a very short time just prior to the making of the affidavit, but at the time the affidavit was made, the rent card of Brown & Co., her agents, offering the house for rent, was tacked on the door, and yet no inquiry was made of this firm. No inquiry was made of the tenant Donati, who had very recently moved out and whose name and place of residence could have been easily ascertained. Other methods of inquiry would also suggest themselves to the diligent and earnest inquirer. How can it be claimed that diligence was used on behalf of Glenn to obtain this information? The return "not found" made by the deputy sergeant proves nothing and is of no effect.

In the case of *Van Metre v. Sankey*, 148 Ill. 536 (36 N. E. 628), where a question of this same kind was being considered, the court said: "'Diligent inquiry,' as used in the statute, means such inquiry as a diligent man, intent upon ascertaining a fact, would usually and ordinarily make—inquiry with diligence and in good faith to ascertain the truth." See also *Howard v. De Cordova*, 177 U. S. 609. I refer also to *Va. B. & L. Co. v. Glenn*, 99 Va. 460, which is, I think, authority for the proposition that the regularity and validity of the proceeding may be looked into. Upon the whole I think that the prayer of the bill must be granted. A decree may be entered giving Mrs. Mathews the relief prayed for.

A decree having been entered in conformity with this opinion, a petition for appeal was presented to the judges of the Supreme Court of Appeals of Virginia, and later was by them *Denied*.

(EDITORIAL NOTE.—This is a most important ruling. The law of tax-titles in Virginia has been a subject of profound interest to her people in recent years, and this case marks another stage in the ebb of judicial opinion in the series of questions that have arisen out of the Land-Grabbers' Act. (See 7 VIRGINIA LAW REGISTER, 322). The origin of this stringent legisla-

tion was unquestionably the immense amount of defaulted taxes upon real estate in this state, and two assertions can be safely made—first, that the legislature intended to lift the tax-title out of the odium usually incident to it, and to give to its purchaser, as far as it could, a substantial and sufficient assurance of his rights; second, that our courts, recognizing this intention, construed the statutes accordingly. Cases like the principal one, of woful hardship, were presented, but the courts consistently refused to interfere upon that ground and enforced the letter of the law. Thus in 1897, in *Thomas v. Jones*, 94 Va. 756, it was held broadly that the title acquired by the purchaser under section 666 of the Code can be defeated only by proof that the taxes were not properly chargeable on the real estate or that they had been paid, and that whether the notice required by Acts 1895-6, page 219, to be served on the owner or his personal representative, has been properly served or not, is immaterial. It was further held that taxes on real estate, though assessed against a vendee subsequent to his purchase, have priority over a vendor's lien for purchase money; that the state took the title vested in the land-owner and all subsequent liens became extinguished by the tax-sale. In 1899 in the case of *Virginia Coal Co. v. Thomas*, 97 Va. 527, this ruling was affirmed. In 1900, in *Thomas v. Jones*, 98 Va. 323, the court approved the action of the lower court in setting aside a tax-title obtained through a misunderstanding between counsel for the land-owner and the clerk of the court, though no fraud was imputed. In 1901, in *Virginia B. & L. Assn. v. Glenn*, 99 Va. 460, the court declared that it was never intended by the law-making power of the Commonwealth to lay down a hard and fast rule that one who had obtained a deed under this section should be secure in his title, although he had obtained his deed without complying with the essential requirements of the statute, and that one of these was the giving of notice to lien-holders.

In the principal case the Chancery Court carries this principle further and declares what is *not* sufficient notice to the land-holder. The gist of its ruling is that the return of a sheriff or sergeant upon process issued in pursuance of an application under section 666 of the Code is not conclusive, and that assuming that the affidavit or return of diligence is in legal form, the court will go behind the return and inquire whether "actual diligence measuring up to the legal standard" was used.

It would seem at first glance that the broad doctrine of *Preston v. Kindrick*, 94 Va. 760, and of *Ramsbury v. Kline*, 96 Va. 465, has been at least qualified by this ruling. The court in those cases held that the return of an officer showing due execution of a writ cannot be contradicted by a defendant unless he can show that the plaintiff procured or induced the false return, or was in some way connected with the deception—in other words, that it is otherwise *absolutely conclusive*. If the holding of the principal case is only a qualification, it is certainly a substantial one—that a return of "not found" or "no inhabitant" is not conclusive and that if it can be shown that the officer could by legal diligence have found the party named in the process, the return and the subsequent proceedings in the matter will be set aside.

It is to be noted, however, that the record in the principal case shows that

the deed to the land-owner was made to her as the wife of W. H. Mathews, a well-known citizen of Richmond, whose name was in the city directory, and that the applicant knew this, but did not acquaint the officer with the fact. It was therefore contended by complainant that the applicant "induced this false return or was in some way connected with the deception"—thus bringing the case within the exception in the two cases mentioned. While the opinion of the learned judge of the Chancery Court does not refer to this element, it was in the record and a matter of argument at bar, and doubtless controlled his judgment upon the point. Further, there is nothing in the principal case even to suggest that, had *personal* service been made upon Mrs. Mathews, the deed would have been adjudged invalid.

The immediate and necessary effect of this ruling must be to impair the market value of all titles to real estate based upon proceedings under the provisions of section 666 of the Code, where personal service of process has not been made upon the land-owner—and the number of them is considerable.

An examiner of such a title must now report, if the facts otherwise justify it, that he finds a perfect title of record, but has no means of knowing whether or not due diligence was exercised by the officer in locating the land-owner. With the lapse of time, this difficulty will of course increase, and the result will necessarily be that the intending purchaser will reject the title or obtain it at a smaller price than that at first stipulated, because of the risk which he runs of losing it outright. And in this phase of the question, the lesson to the holder of such a title is the old one, Beware! "Each case," says the Chancery Court, "must be tested by the peculiar circumstances of that case.")